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Doping, Athletes, and Arbitration - A Case Study on the Need for Transparency in the System

Doping, Athletes, and Arbitration
**A Case Study on the Need for
Transparency in the System**

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I. Introduction

In recent decades, our society has increasingly viewed athletes with iconic-like status, as role models and heroes. Participation in sporting activities is no longer seen as just a “hobby,” but rather, it has become a viable profession. Today, the world of an elite athlete is lucrative as it includes large employment contracts, signing bonuses, and seemingly endless endorsement opportunities. As one commentator aptly stated, “for many Olympic caliber athletes, training and competing in their chosen sport is their job, their means of supporting themselves and their families.”¹ Even the one-time world of strict amateur athleticism has faded and become semi-professional in nature; the only difference between amateur and professional athletes is that the later are compensated for their athletic performance, while the former are not.²

For many athletes, the pressures associated with the heightened attention are overwhelming and may ultimately lead to the use of non-prescription drugs to attain or remain at elite performance levels.³ In response, sporting authorities have enacted regulations prohibiting the use of certain performance-enhancing substances, otherwise

¹ Urvashi Naidoo & Neil Sarin, *Dispute Resolution at Game Time*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 489, 503 (2002).

² James A.R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT’L L. 489, 500 (1992) (stating that the one-time rigid requirement for strict amateurism in competition has faded).

[A]thletes may enter into lucrative commercial identifications in advertising and public relations so long as they comply with regulations established by their IFs [International Federations, discussed in more detail below] in conformity with the Olympic Charter. To the extent that the traditional dichotomy [between professional and amateur athletes] remains, “amateurism” is not antithetical to commercialization of an athlete’s or organization’s name, likeness or reputation, but only to professionalism, which means that payment is expected for athletic performance, and even that distinction is no longer as important as it once was.

Id.

³ See generally *id.* at 501-02.

known as doping.⁴ The governing doping regulations are aimed at preserving the health and well-being of athletes, as well as ensuring equitable conditions and a sense of fair play.⁵ When a violation of doping regulations occurs, the governing sports bodies are authorized to take action.⁶

The sports-related litigation has increased as the popularity and viability of sports as a profession has increased.⁷ This litigation often involves athletes, coaches, corporate sponsors, National Governing Bodies (“NGB”), and networks.⁸ Arbitration has increasingly become the preferred method of resolving these disputes.⁹ Courts have generally shown a willingness to defer to the decisions of arbitrators; this has become especially true since the recent litigation boom has led to an increase in docket congestion.¹⁰ In contrast to court proceedings, arbitration is relatively quick, efficient, and confidential.¹¹ In addition, parties to a dispute benefit from the expert status of

⁴ *Id.* at 503.

⁵ See generally NEIL J. DOUGHERTY ET AL., SPORT, PHYSICAL ACTIVITY, AND THE LAW 136 (1994).

⁶ See generally Jill Pilgrim & Kim Betz, *A Journey Through Olympic Drug Testing Rules: A Practitioner’s Guide to Understanding Drug Testing Within the Olympic Movement*, 2 VAND. J. ENT. L. & PRAC. 210 (2000).

⁷ MARTIN J. GREENBERG & JAMES T. GRAY, SPORTS LAW PRACTICE 96 (2d ed. 1998).

⁸ *Id.*

⁹ *Id.* stating the following:

[S]ports have not been immune to the recent proliferation of alternative dispute resolution methods. In fact, the use of [the] alternative dispute resolution processes has become the norm within the professional sporting arena. Arbitration in particular has for the most part become the exclusive method of resolving disputes.

¹⁰ GEORGE W. SCHUBERT, ET AL., SPORTS LAW 172 (1986). In addition to deferring to the decisions of arbitrators, courts are generally reluctant to interpret the scope and enforceability of arbitration clauses. *Id.*

¹¹ ALAN SCOTT RAU, ET AL, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 600 (3d ed. 2002) (stating that “[a]rbitration tends to be a speedier process in part because it allows the parties to bypass long queues at the courthouse door and to schedule hearings at their own convenience.”) *Id.* This is aided by the streamlined pre-trial procedures, pleadings, and discovery. *Id.* at 601. The confidential nature of arbitration results in little dissemination of information to the public, an aspect that is particularly significant when athletes’ careers may depend on the treatment they receive by the news media. MARTIN J. GREENBERG & JAMES T. GRAY, SPORTS LAW PRACTICE 103 (2d ed. 1998). For example, public opinion of the athlete may affect the availability to the athlete of lucrative endorsement contracts. *Id.*

arbitrators.¹² It is the role of the arbitrator(s) to hear the case, as presented by the parties, and render judgments according to the applicable or agreed-upon law.¹³ Decisions, depending on the arbitral body, are typically binding and final.¹⁴

This article will focus on Olympic athlete sanctioning by arbitral tribunals following the discovery of doping violations. In particular, it will concentrate on cases brought before the Court of Arbitration for Sport, which is the court of last resort for the Olympic athlete. Such cases are, and should remain, transparent to the public because of the nature of the (alleged) offense and the unique role-model status of the offender-athlete. In addition, would-be offenders and emulators can be effectively deterred from potentially dangerous and illegal activities through education and a transparent dispute resolution process, which subjects alleged violators to public scrutiny. For those that are alleged to have committed a violation, but are innocent, they are in the same position of transparency as they would be as a defendant within the United States court system.

¹² RAU, *supra* note 11, at 601. Since the parties can choose their arbitrators, they are able to choose those with expert knowledge of the subject matter. *Id.* As a result, the education of a judge or jury on the intricacies of a particular field or industry norm can be avoided. *Id.* In particular, “[t]he evidence from arbitration is that a single qualified lay judge is superior to six or twelve randomly selected laymen - on reflection, a not implausible suggestion.” *Id.* (quoting William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 252 (1979)).

¹³ *Id.* at 611.

¹⁴ *Id.* at 653. At common law, an award was considered binding if the parties voluntarily submitted to arbitration and an award was rendered; however, prior to the rendering of an award, either side could refuse to honor the arbitration agreement. *Id.* There are now statutes in place in most states and federally to reverse this common law position on arbitration. *Id.* at 654. These statutes, however, have not been interpreted as exclusive. *Id.* Therefore, when there is no written arbitration agreement, or if the subject matter of the dispute has been specifically excluded from the arbitration agreement, an arbitration decision will not be binding if the consent to arbitrate has been revoked by a party and they have filed an objection. *Id.*

II. Background

A. An Overview of the Arbitral Process

Arbitration, often described as a voluntary process whereby a “private tribunal” is impaneled to hear and judge a case, is often considered a more efficient and preferred means of resolving disputes over formal litigation.¹⁵ Parties often cite several key factors for preferring arbitration.¹⁶ They include greater autonomy, efficiency in time and expense, predictability of applicable law, ability to enforce decisions in foreign jurisdictions, and the availability of expert decision-makers.¹⁷ Another important factor in determining whether to arbitrate a claim is confidentiality¹⁸, which is further discussed below.¹⁹

Arbitration’s reputation for being a relatively “speedy” process results directly from the parties being allowed to schedule hearings at their own convenience.²⁰ The relative informality of arbitral proceedings has also contributed to the speedy resolution of claims because the pretrial procedures such as pleadings, motions, and discovery are often redacted or completely eliminated.²¹ As a result of this efficiency, costs of arbitration are often less than they would be in a traditional court proceeding.²² For example, attorney fees are usually lower than they would be if the matter were fully

¹⁵ *Id.* at 600. It should be noted, however, that arbitration “is sometimes imposed by law as a *mandatory*, non-consensual form of dispute resolution.” *Id.*

¹⁶ See Cindy G. Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT’L ARB. 121, 122 (2003).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Part B, p. 12, *supra*.

²⁰ RAU, *supra* note 11, at 600. For example, in the commercial arbitration cases administered by the American Arbitration Association in 1999, an average of only 114 days elapsed from the date a case was assigned to an arbitrator and the date the file was closed. *Id.*

²¹ *Id.* at 601.

²² *Id.* While expenses are often reduced in arbitral proceedings, there is no guarantee of such occurrence in every case. *Id.*

litigated in court because attorneys spend less time in preparation for arbitration than a drawn-out litigation process.²³

When the possibility of international litigation arises, arbitration tends to be favored due to the perceived unpredictability of international litigation and language barriers.²⁴ The potential involvement of multiple bodies of law and court systems, foreign procedural complexities, and the uncertainty of domestic enforcement of a foreign award contribute to this perception.²⁵ As a result of the uncertainty, arbitration provisions are often part of contract terms.²⁶ In fact, “arbitration clauses ‘not only predominate but are nowadays almost universal’ and are virtually taken for granted.”²⁷ As such, the applicable law and procedure are usually specified within agreements (and athletic contracts) which eliminates major uncertainties associated with international law and forums.²⁸

In a typical arbitration proceeding, the parties are able to choose their arbitrators and thus often benefit from having decision makers who are experts in the particular field in dispute.²⁹ Ideally, this results in the elimination of the time-consuming process of educating the decision-maker as to the relevant industry norms and standards.³⁰

²³ *Id.*

²⁴ *Id.* at 626.

²⁵ *Id.*

²⁶ *Id.* at 627.

²⁷ *Id.* (quoting Justice Kerr, *International Arbitration v. Litigation*, J. BUS. L. 164, 165, 171 (1980)).

²⁸ *Id.*

²⁹ *Id.* at 601. The number of arbitrators presiding over any given proceeding can vary and depend on whether there is an agreement between the parties and the rules of a particular arbitral association. For example, there can be either one or three arbitrators in proceedings before the Court of Arbitration for Sport. See also Oschutz, *supra* note 29, at 676.

³⁰ RAU, *supra* note 11, at 601. Many find that “a single qualified lay judge is superior to six or twelve randomly selected laymen.” *Id.* (quoting William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 252 (1979)).

Furthermore, the informal and private nature of the proceedings may lessen the hostilities between the parties.³¹ Specifically,

[t]aking a dispute out of the courtroom and into the relative informality of arbitration may reduce the enmity and heightened contentiousness which so often accompan[ies] litigation, and which work[s] against a future cooperative relationship. The privacy of the process may also contribute to a lessening of hostility and confrontation. An arbitration hearing . . . is [generally] not open to the public, and unless the result later becomes the subject of a court proceeding it is not a matter of public record.³²

Due to its private and voluntary nature, arbitration may fail to formulate, apply, and communicate general principles of decisions.³³ The American Arbitration Association (AAA), a private non-profit organization founded in 1926, conducts a large number of arbitrations each year and actively discourages arbitrators from writing “reasoned opinions attempting to explain and justify their decisions”³⁴ In addition, cases are not necessarily decided according to the rule of law.³⁵ This is because an arbitrator has the authority to “do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement.”³⁶ American courts will rarely overturn an arbitral award that fails to follow applicable standards unless there is an instance of misconduct by the arbitrator³⁷ or a manifest disregard for the law.³⁸ Because arbitral decisions are often not published or subjected to court review, they rarely hold any precedential value.³⁹

³¹ *Id.*

³² *Id.*

³³ *Id.* at 611.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*;

³⁷ *Id.* at 653.

³⁸ See generally *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985).

³⁹ RAU, *supra* note 11, at 611-12.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁴⁰ concluded in 1958, has helped alleviate yet another concern involving international dispute resolution - enforcement.⁴¹ Article III of the Convention states: “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon....”⁴² This provision requires that every party to the Convention enforce, in their domestic courts, foreign arbitral awards in the same manner as they would enforce domestic awards. With few exceptions, international arbitral awards are enforced.⁴³

B. Confidentiality in Arbitration

As noted above, confidentiality is a key factor contributing to the decision to arbitrate a dispute and is often considered one of the hallmarks of arbitration.⁴⁴ While enumerated as an important factor, confidentiality has been often considered “less important” than other arbitration attributes such as arbitrator expertise and finality of

⁴⁰ RAU, *supra* note 11, at 626-7. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards is more commonly referred to as the “New York Convention.” See, e.g., Susan L. Karamanian, *The Road to the Tribunal and Beyond; International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT’L L. REV. 17, 18 (2002). For the full text of the New York Convention, see Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517.

⁴¹ See *id.* The majority of countries who are parties to the New York Convention have, however, opted for a reciprocity reservation. See Dana H. Freyer, *Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts: A U.S. Perspective*, 15 J. INT’L ARB. 7, 26, n.76 (1998).

⁴² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 987 (2d ed. 2001) (hereinafter New York Convention).

⁴³ Article V of the New York Convention provides for a few limited circumstances where enforcement of arbitral award may be refused by courts. Possible grounds for refusal to enforce include: incapacity, agreement not being valid under the law to which the parties have agreed, lack of notice, award beyond the scope of matter to be arbitrated, and failure of the award to become binding on the parties. See *id.* at 988. The party seeking to prevent enforcement carries the burden.

⁴⁴ Buys, *supra* note 16, at 122. See also Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT’L L. REV. 969, 972 (2001). The term “confidentiality” is often used interchangeably with “privacy.” *Id.*

decision.⁴⁵ Nevertheless, there are several reasons why confidentiality in arbitration is valuable.⁴⁶ These reasons include:

1. the desire to prevent exposure of certain allegations to the public,
2. the desire to prevent publication of a “loss” (especially if there are other similar cases pending),
3. to enable parties to take positions privately that would be difficult to take publicly, and
4. to enable the protection of trade secrets and sensitive business information.⁴⁷

In arbitration, confidentiality applies to three main groups: the arbitrators, third parties (i.e. witnesses), and the disputing parties.⁴⁸ Generally, arbitrators have an ethical duty to maintain confidences, while witnesses are not bound by a duty of confidentiality, absent a specific contractual obligation.⁴⁹ Depending on the arbitral body, applicable law and procedures, and the nature of the information discussed, the parties to the dispute may or may not be bound by a duty of confidentiality.⁵⁰ The

⁴⁵ Richard W. Naimark & Stephanie E. Keer, *What Do Parties Really Want From International Commercial Arbitration?*, 57 DISP. RESOL. J. 78, 84 (Nov. 2002/Jan. 2003). In one study, less than ten percent of participants surveyed listed privacy as one of the most important aspects of arbitration. *Id.* In fact, among eight factors tested—including fair and just result, cost, monetary award, finality of decision, speed, arbitrator expertise, privacy, and future relations—privacy rated in the bottom one third for importance. *Id.* at 80. Possible explanation for these startling findings, especially when considering “the utility of the arbitration process for protecting trade secrets, business processes, business lists and reputations,” can be attributed to the following:

Subsequent discussions with arbitrators in a round-table setting revealed a view that privacy is an often overrated attribute. Publicly traded companies have to make disclosures about significant financial exposure from legal proceedings. Other parties make no attempt to cloak their involvement in arbitration, with some resorting to the press as a means of applying pressure to their adversary. This is not to say that in certain specific cases privacy is not of primary importance.

Id. at 84.

⁴⁶ Buys, *supra* note 16, at 123.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 124.

⁵⁰ *Id.*

information covered by arbitration confidentiality can include any or all of the following: the facts of arbitration, the substance of the proceeding, witnesses testimony, transcripts and minutes of the hearings, the deliberation of the tribunal, and the award rendered.⁵¹

Some institutional arbitration rules provide for the protection of both the confidentiality of the hearings and the evidence produced therein.⁵² Few expressly prohibit the disclosure of the existence of the arbitration.⁵³ In the instances where confidentiality of the award is mandated, there are often exceptions to the rule, for example, if required by law or if needed for enforcement purposes.⁵⁴

C. Court of Arbitration for Sport

The Court of Arbitration for Sport (“CAS”), an arbitral body with sport-specific jurisdiction, was a concept formalized by Juan Antonio Samaranch shortly after his election as President of the International Olympic Committee (“IOC”) in 1981 as a direct response to the increasing number of sports-related disputes and the lack of an

⁵¹ *Id.*; see also Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT’L L. REV. 969, 1001-14 (2001).

⁵² Buys, *supra* note 16, at 125-28. For example, arbitration proceedings before the London Court of International Arbitration (LCIA) are private unless there is an agreement between the parties providing otherwise, or the Tribunal so directs it. *Id.* at 126. In addition to some institutional rules mandating confidentiality, a duty of confidentiality in arbitration can be implied-in-law, by party agreement, international convention, national legislation, and common law. See Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT’L L. REV. 969, 988-1001 (2001).

⁵³ Buys, *supra* note 16, at 129. The World Intellectual Property Organization (WIPO) has the most stringent rules in this respect; parties may not disclose information “concerning the existence of the arbitration to any third party except to the extent necessary in connection with a court challenge or an action to enforce the award or unless required by law or a regulatory body.” *Id.* at 126.

⁵⁴ *Id.* at 129. For example, the rules governing arbitration before the International Chamber of Commerce (ICC) authorize the publication of retracted awards to ensure anonymity of the parties. *Id.* at 125. In contrast, the rules of the United Nations Commission on International Trade Law (UNCITRAL) prohibit the publication of arbitration awards without the prior consent of the parties. *Id.* at 126.

independent body capable of issuing binding decisions.⁵⁵ The CAS body was ratified by the IOC in 1983, and was formally established in 1984 with its headquarters in Lausanne, Switzerland.⁵⁶ After a structural revision to obtain more independence from the IOC in 1994, the CAS is now governed by a twenty-member council, which is known as the International Council of Arbitration for Sport, ("Council"), an independent foundation under Swiss law.⁵⁷ Today, after hearing disputes for two decades, the CAS is considered a central mechanism for resolving sporting disputes⁵⁸ and has earned a reputation for fairness and independence.⁵⁹

A case may be brought before the CAS if the dispute is:

1. subject to an arbitration agreement in which the parties have stipulated CAS jurisdiction, and
2. connected with sports.⁶⁰

⁵⁵ Matthieu Reeb, *The Court of Arbitration for Sport*, at <http://www.tas-cas.org/en/histoire/histoireA.htm> (last visited Nov. 11, 2004).

⁵⁶ *Id.*; see also James A.R. Nafziger, *Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. 161, 167 (2002).

⁵⁷ Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICK. L. REV. 523, 541 (2002). The 1994 restructuring was undertaken to establish more independence and effectively correct one of the strongest points of criticism of the CAS. *Id.* The International Council of Arbitration for Sport (ICAS) is responsible for the administration and operation of the CAS; acting as a buffer between the sports establishment and the arbitration process. *Id.* In addition, the ICAS is not only responsible for the adoption and amendment of the CAS rules (the Code of Sports-Related Arbitration), but it appoints arbitrators, decides challenges to arbitrators, and sets budgets. *Id.* While there is still some criticism of the CAS's independence because of the Council's make up and the fact that the funding is closely linked to the IOC, its independence has been upheld under both the pre- and post-1994 rules by the Federal Tribunal of Switzerland. Oschutz, *supra* note 29, at 677.

⁵⁸ James A.R. Nafziger, *Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. 161, 167 (2002).

⁵⁹ Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 245 (2004).

⁶⁰ Reeb, *supra* note 55. According to the Court of Arbitration for Sport:

These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings).

This jurisdictional requirement has enabled hearings covering, *inter alia*, disputes among athletes, international and national sports federations, national Olympic committees, event organizers, and employment and endorsement contracts.⁶¹

The first prong of the jurisdiction test, that the dispute is subject to an arbitration agreement, is met when there is a contractual agreement between the parties, or when the rules governing a particular sport provide for CAS jurisdiction.⁶² The second prong, that the dispute be connected with sports, is fairly easy to establish and can generally be divided into two categories: commercial and disciplinary sporting disputes.⁶³ Commercial actions generally involve disputes over the execution of contracts, sales of television rights, staging of sporting events, and player transfers. In contrast, disciplinary actions often encompass disputes pertaining to doping, violence on the playing field, and the mistreatment of animals in sports, such as horses.⁶⁴ Traditionally,

Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport.

Court of Arbitration for Sport, Code at R27, available at <http://www.tas-cas.org> (last visited Nov. 11, 2004).

⁶¹ See generally Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 516 (2001).

⁶² Oschutz, *supra* note 29, at 677. See also Court of Arbitration for Sport, Code at R27, available at <http://www.tas-cas.org> (last visited Nov. 11, 2004).

⁶³ Reeb, *supra* note 55.

⁶⁴ *Id.* For example, on February 7, 2005, the equestrian Ludger Beerbaum appealed a decision by the Judicial Committee of the International Equestrian Federation (FEI) that disqualified both the rider and his horse, Goldfever 3, from all competitions in the 2004 Athens Summer Olympics. The incident leading up to the disqualification involved the use of ointment containing a prohibited substance to treat eczema on the horse. Although it was generally agreed on by veterinarians that the prohibited substance, bethametasone (a type of steroid), would have had no effect on Goldfever's performance, the anti-doping rules were strictly applied. As a result of Beerbaum and Goldfever's disqualification, the medal standing for the team show jumping competition was altered: Germany moved from the gold medal position to bronze, the United States moved from silver to gold, and Sweden moved from bronze to silver. A decision by the Court of Arbitration for Sport is expected by June 2005, providing that the Court adheres to its usual time frame for rendering decisions (i.e. four months or less). See generally The Associated Press, *Germany to Lose Gold*, N.Y. TIMES, Jan. 9, 2005, at 10; The Associated Press, *Show Jumper Appeals Disqualification*, N.Y. TIMES, Feb. 8, 2005, at 4; Press Release, Court of Arbitration for Sport,

the majority of cases filed with the CAS are disciplinary in nature.⁶⁵ Throughout its history, the CAS has never found a lack of jurisdiction due to the absence of a sports-related nexus.⁶⁶

Generally, cases brought before the CAS for resolution are decided either by a single arbitrator or a panel of three arbitrators (by majority vote).⁶⁷ CAS arbitrators have “full legal training [and are] recognized [as competent] with regard to sports law and/or international arbitration.”⁶⁸ Furthermore, arbitrators are generally knowledgeable about sports and have a command of at least one of the CAS’ two working languages (French and English).⁶⁹ Arbitrators do not have the ability to create new offenses; rather, their role is limited to the interpretation of statutes already in force.⁷⁰ Upon appointment, all arbitrators sign a declaration affirming that they will undertake their functions with

Equestrian—Olympic Games: Ludger Beerbaum to Appeal Against his Disqualification to the Court of Arbitration for Sport (CAS) (Feb. 7, 2005), at <http://www.tas-cas.org/en/medias/frmmed.htm>.

⁶⁵ Reeb, *supra* note 55. Sixty five percent of the cases filed with the CAS in 2000 were disciplinary in nature. *Id.* See also James A.R. Nafziger, *Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. 161, 167 (2002), stating that six of ten randomly selected disputes brought before the CAS involved charges of doping against athletes.

⁶⁶ Reeb, *supra* note 55.

⁶⁷ *Id.* CAS regulations require a list containing a minimum of 150 arbitrators; however, the number has consistently exceeded this minimum threshold. *Id.* Specifically, the Code states:

The personalities designated by the ICAS, in conformity with Article S6, paragraph 3, appear on the CAS list for a renewable period of four years. The ICAS reviews the complete list every four years; the new list enters into force on 1 January of the following year.

There are at least one hundred and fifty arbitrators and at least fifty mediators.

Court of Arbitration for Sport, Code at S13, available at <http://www.tas-cas.org> (last visited Nov. 11, 2004). See also Oschutz, *supra* note 29, at 676.

⁶⁸ Court of Arbitration for Sport, Code at S14, available at <http://www.tas-cas.org> (last visited Nov. 11, 2004).

⁶⁹ *Id.* The designated languages of CAS are French and English. *Id.* at R29. In the absence of an agreement between the parties, the President of the Panel is to select one of the two languages. Parties, however, are free to agree on an operating language. *Id.*

⁷⁰ Oschutz, *supra* note 29, at 682. For example, in the Nagano Olympics, where a snowboarder tested positive for marijuana metabolites, it was found that there was no doping offense due to the absence of an agreement between the International Federation and the IOC, as the Antidoping Code provided that marijuana was only prohibited if such an agreement existed. *Id.*

objectivity, independence, and in conformity with the provisions of the Code of the Court of Arbitration for Sport (“Code”).⁷¹ The duty of confidentiality binds the arbitrators who are prohibited from disclosing information or facts pertaining to CAS proceedings to third parties.⁷² If a set of rules has been stipulated contractually, the arbitrators will apply those rules.⁷³ In the absence of party-stipulated rules, the CAS arbitrators will apply Swiss law to proceedings before them.⁷⁴

Disputes submitted to the CAS for decision can be brought in either the main office in Lausanne, or in one of the two permanent decentralized offices located in Sydney, Australia and New York City, United States of America.⁷⁵ The creation of the two decentralized offices has made access to the CAS easier for those located in Oceania and North America.⁷⁶ The decentralized offices are considered “attached” to the court office in Lausanne and are thus fully competent to receive and be notified of pertinent procedural acts.⁷⁷ In addition to having access to the CAS, disputants have the opportunity to submit disputes to a special Ad Hoc Division.⁷⁸ Initially established for the 1996 Atlanta Summer Olympics to augment an athlete’s rights⁷⁹ and enable speedy⁸⁰ on-site dispute resolution, the ad hoc division today is touted as one of the

⁷¹ Court of Arbitration for Sport, Code at S18, *available at* <http://www.tas-cas.org> (last visited Nov. 11, 2004).

⁷² *Id.* at S19.

⁷³ Court of Arbitration for Sport, Code at R45, *What Law Do the Arbitrators Apply?*, *available at* <http://www.tas-cas.org/en/code/frmco.htm> (last visited Nov. 14, 2004).

⁷⁴ *Id.*

⁷⁵ Reeb, *supra* note 55. The two decentralized offices were originally established by ICAS in Sydney, Australia and Denver in the United States of America in 1996, with a subsequent relocation of the Denver office to New York in 1999. *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 523 (2001). The ad hoc division is required to render a decision within 24 hours of the lodging of a complaint; however, the President may extend this time limit. *Id.*

main factors contributing to the CAS' reputation for excellence in the resolution of international sporting disputes.⁸¹ The Ad Hoc Division is composed of two co-presidents and twelve arbitrators who apply a simple and flexible procedure to disputes at no cost.⁸² Either one arbitrator or a panel of three arbitrators presides over each Ad Hoc proceeding⁸³ and their written decisions are typically final and binding, (i.e. they usually may not be appealed or challenged).⁸⁴ The Ad Hoc Division has, in recent years, expanded beyond the Olympic realm and now also presides over disputes arising out of other international sporting events, such as the Commonwealth Games in Kuala Lumpur.⁸⁵

Disputants may reach CAS arbitration either by directly submitting cases to the Ad Hoc Division or by means of appeal from decisions of other organizations.⁸⁶ For example, in the United States, the Ted Stevens Olympic and Amateur Sports Act of 1978 (ASA) created a detailed administrative structure through which arbitration proceedings for a sports dispute will progress.⁸⁷ Within this structure, the NGB of the sport is the first step in the process, followed by the United States Olympic Committee ("USOC"), and then the AAA.⁸⁸

⁸¹ Reeb, *supra* note 55.

⁸² *Id.* Arbitrators of the ad hoc division are taken from the "pool" of CAS arbitrators. See Oschutz, *supra* note 29, at 676.

⁸³ Oschutz, *supra* note 29, at 676.

⁸⁴ Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 523 (2001). On rare occasions, decisions have been challenged and were appealed to the Swiss Federal Tribunal. *Id.*

⁸⁵ Reeb, *supra* note 55. The CAS was also approached by the European Football Union (UEFA) with the goal of establishing an ad hoc division for disputes arising out of or related to the European Championship held in Belgium and the Netherlands during 2000. *Id.*

⁸⁶ See generally Straubel, *supra* note 57; Jill Pilgrim & Kim Betz, *A Journey Through Olympic Drug Testing Rules: A Practitioner's Guide to Understanding Drug Testing Within the Olympic Movement*, 2 VAND. J. ENT. L. & PRAC. 210, 216 (2000).

⁸⁷ Straubel, *supra* note 57, at 533-34.

⁸⁸ For a detailed discussion of the hearing process see *id.* at 534. It should, however, be noted that there are often several steps within each stage of the proceeding. For example, within the NGB, doping

In the international arena, an International Federations (“IF”) will have jurisdiction over a given dispute, as well as the NGB, because NGBs are “uniformly required to follow and implement IF rules.”⁸⁹ Thus, IFs have the power to review and correct decisions made by NGBs where IF rules were applied erroneously.⁹⁰ In the event of dissatisfaction with an IF ruling, an appeal may be lodged with the CAS.⁹¹ In the past, the concurrent jurisdiction of both the national and international governing bodies has led to conflicting decisions.⁹²

D. Doping Violations by Olympic Athletes and the Resulting Arbitration

Drug use by an Olympic athlete is called “doping” in the Olympic Movement Anti-Doping Code (“OMAD Code”).⁹³ According to the OMAD Code, doping is specifically defined as “the use of an expedient substance or method which is potentially harmful to [an] athletes’ health and/or capable of enhancing their performance, or the presence in the athlete’s body of a prohibited substance.”⁹⁴ Prohibited substances under the OMAD Code include, but are not limited to, anabolic steroids, beta-blockers, and diuretics.⁹⁵

disputes move through the National Board, Board of Directors, and Doping Appeals Board. *See id.* at 534-35. Thereafter, if the athlete is dissatisfied with the decision, the athlete may appeal to the USOC and then to the AAA. *See id.* at 535-36.

⁸⁹ *Id.* at 538.

⁹⁰ *Id.*

⁹¹ *Id.* at 539.

⁹² For example, American athletes Mary Slaney and Jessica Foschi were simultaneously cleared domestically of doping offenses while International Federations upheld their suspensions. *Id.* at 540. Four English athletes, Mark Richards, Dougie Walker, Gary Cadogan, and Lindford Christie, experienced similar results when they were cleared of doping offenses by U.K. Athletics only to have their suspensions renewed by their IF on IFs own motion. *Id.* at 530.

⁹³ Brian Lee, *Drug Testing and the Confused Athlete: A Look at the Differing Athletic Drug Testing Programs in High School, College, and the Olympics*, 3 FL. COASTAL L.J. 91, 105 (2001).

⁹⁴ *Id.* Under pressure from Olympic Athletes and the Olympic Community, the IOC and other international organizations in 1999-2000 drafted the Olympic Movement Anti-Doping Code. *Id.* at 104. It was a uniform effort by different Olympic organizations to standardize testing programs and review procedures for all Olympic Athletes. *Id.* at 104-05. This is in contrast to the differing standards in use prior to the OMAD Code’s formulation. *Id.*

⁹⁵ *Id.*

The minimum penalty under the OMAD Code for a doping violation is a two-year suspension.⁹⁶

According to the Olympic Charter, the use of performance enhancing drugs is a violation of the spirit of fair play in sports.⁹⁷ Drug use, considered to be one of society's worst evils, is prohibited from use by elite athletes and is regulated through testing for several reasons.⁹⁸ First and foremost, drug use is prohibited to help preserve the health and well-being of the athlete.⁹⁹ Secondly, the prohibition exists to ensure equitable conditions and foster the Olympic spirit.¹⁰⁰ Lastly, testing for violations is conducted to ensure adherence to applicable laws and league rules.¹⁰¹

The first testing of athletes to stamp out performance-enhancing drug use began in 1968 with the Olympic Movement and continues today.¹⁰² While doping violations can be attributed to unscrupulous doctors who assist a cheating athlete, not all doping violations occur with an intention to do so by the doctor and/or athlete. For instance, Andreea Raducan, a Romanian Gymnast who finished first in the Women's Individual All-Round in the Sydney Olympics, was given cold medicine by her team doctor and subsequently tested positive for the banned substance pseudoephedrine (commonly

⁹⁶ *Id.*

⁹⁷ WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* 581 (2d ed. 2004).

⁹⁸ Brian Lee, *Drug Testing and the Confused Athlete: A Look at the Differing Athletic Drug Testing Programs in High School, College, and the Olympics*, 3 FL. COASTAL L.J. 91, 91 (2001). It should be noted that drug use in general is discouraged and/or banned from most sports; however, the focus of this comment is the elite, Olympic-caliber, athlete.

⁹⁹ DOUGHERTY, *supra* note 5, at 136.

¹⁰⁰ *Id.* See also Brian Lee, *Drug Testing and the Confused Athlete: A Look at the Differing Athletic Drug Testing Programs in High School, College, and the Olympics*, 3 FL. COASTAL L.J. 91, 109 (2001).

¹⁰¹ DOUGHERTY, *supra* note 5, at 136.

¹⁰² Jill Pilgrim & Kim Betz, *A Journey Through Olympic Drug Testing Rules: A Practitioner's Guide to Understanding Drug Testing Within the Olympic Movement*, 2 VAND. J. ENT. L. & PRAC. 210, 211 (2000).

found in nasal decongestants).¹⁰³ Despite the unintentional ingestion of the prohibited substance, Raducan was stripped of her gold medal following the positive test result.¹⁰⁴

To ensure compliance with anti-doping regulations, athletes are subject to drug testing.¹⁰⁵ The regiment of tests that an athlete is subject to can be classified into two categories: in-competition and out-of-competition.¹⁰⁶ In-competition drug testing is conducted during a specified competition with a sample given by the athlete at the site of the athletic event, while out-of-competition testing may occur at any time with or without advanced notice.¹⁰⁷ In addition to being subject to these two different types of testing, all Olympic athletes are subject to testing from a variety of sources because nearly every sports organization, including the IOC, IFs, the USO, and NGBs, conducts its own drug testing.¹⁰⁸

Once a doping violation is discovered by any organization, the NGB of the athlete must hold a disciplinary proceeding in accordance with its rules of procedure.¹⁰⁹ At the athlete's election, an expedited hearing before the AAA is available if the situation is determined to be an emergency.¹¹⁰

¹⁰³ Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 535-36 (2001).

¹⁰⁴ *Id.* AHD concluded, "that doping is a strict liability offense and an element of intention is not required for the commission of a violation." *Id.* at 536.

¹⁰⁵ Jill Pilgrim & Kim Betz, *A Journey Through Olympic Drug Testing Rules: A Practitioner's Guide to Understanding Drug Testing Within the Olympic Movement*, 2 VAND. J. ENT. L. & PRAC. 210, 211 (2000).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 213. During the Olympic Games, the IOC is the "supreme authority" responsible for drug testing. *Id.* at 215-16. The IOC Medical Commission and the IOC Executive Committee solely have the authority to decide issues about positive drug tests; however, all decisions may be appealed to the CAS. *Id.* at 216. American athletes can also appeal IOC decisions to the AAA because of the uncertainty of whether an American athlete must adhere to IOC procedures. *Id.*

¹⁰⁹ *Id.* at 214. The USA Track & Field (USATF) Regulation # 10 (Doping Control) provides that an athlete has (1) the right to have a "B" sample analyzed [a second sample], (2) the right to a full hearing, and (3) the right to an appeal. *Id.*

¹¹⁰ *Id.* See also AAA Optional Rules for Emergency Measures of Protection, available at <http://www.adr.org/index2.1> (last visited on Nov. 9, 2004) (stating that the party needs to submit why it needs such relief on an emergency basis).

When doping violations are brought before arbitral bodies, especially the CAS, a bifurcated process is used.¹¹¹ The steps of this process require (1) an initial finding of liability and then (2) the imposition of a penalty.¹¹² For doping cases, the CAS employs a strict liability standard.¹¹³ While the athlete initially has a presumption of innocence and the respective governing federation has the burden of proof, the burden ultimately shifts to the athlete if the governing federation makes a sufficient showing proving that the banned substance was in the athlete's system.¹¹⁴ To satisfy this initial burden, the governing federation must offer full proof of the presence of a banned substance in the athlete's body "beyond all reasonable doubt and to the satisfaction of law."¹¹⁵ This requirement has been described as "less than [a] criminal standard, but more than the ordinary civil standard."¹¹⁶

In essence, the implementation of this strict liability standard requires that an athlete be found liable for a doping violation even if accident or a third person caused the positive test.¹¹⁷ For an athlete to rebut the presumption of guilt (once the burden has shifted due to a satisfactory showing by the Federation), the athlete must meet a high standard of care test.¹¹⁸ The only effective way to disprove liability is to prove that the test results are unreliable (i.e., through a flaw in the drug testing process).¹¹⁹ The athlete must also show that all necessary precautions were taken to avoid ingestion of

¹¹¹ Straubel, *supra* note 57, at 543.

¹¹² *Id.*

¹¹³ *Id.* See also Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 535 (2001).

¹¹⁴ Oschutz, *supra* note 29, at 691.

¹¹⁵ *Id.* at 694.

¹¹⁶ *Id.*

¹¹⁷ Straubel, *supra* note 57, at 543.

¹¹⁸ Oschutz, *supra* note 29, at 692.

¹¹⁹ Straubel, *supra* note 57, at 543.

the banned substances.¹²⁰ Further, the standard that an athlete must meet in order to prove drug test unreliability is higher than an “ordinary: standard of care.”¹²¹ Expounding on this principle in a case involving an injection of an athlete by a doctor at a hospital, the CAS stated:

In view of the high sanctions placed upon the use of prohibited anabolic steroids, it is incumbent upon the athlete, not only in his own interests, but first and foremost in the interests of fair play in the sport of cycling, that he actively inquire with the physician administering the injection as to its content. In this regard, every athlete should have closely at hand a copy of the most current and governing List of the Categories of Doping Substances and Methods which he can place readily at the disposal of any physician whom he consults for advice and treatment.¹²²

It is in the penalty phase that the athlete’s fault or culpability for the positive test becomes a relevant issue.¹²³ Historically, when athletes have taken banned substances unwittingly, the CAS has reduced the penalties imposed by employing a doctrine of proportionality and the equitable principles of natural justice.¹²⁴ Since the Sydney games, however, there has been a restructuring of doping penalties.¹²⁵ Penalties are now divided into two categories and are based on the level of performance enhancement in the substance and/or method.¹²⁶ The categories and corresponding sanctions are as follows:

¹²⁰ Oschutz, *supra* note 29, at 692.

¹²¹ *Id.*

¹²² *Id.* at 693 (quoting P. v. Federation Internationale de Natation Amateur, No. 97/180, slip op. at 21 (Ct. Arb. Sport Jan. 14, 1999)). The finding by the CAS in the Andreea Raducan case is in line with this strict holding. There, even though Raducan was unaware that the cold medicine given to her by a team doctor contained a banned substance, she was stripped of her Olympic medal. See Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 535-36 (2001).

¹²³ Straubel, *supra* note 57, at 543.

¹²⁴ *Id.* at 543-44. This, however, was not the case in one of the most recent cases decided by the CAS, even though it was decided that the ingestion of a prohibited substance by the athlete was done so unintentionally. See *Edwards v. Int’l Ass’n of Athletics Fed’n*, CAS No. OG 04/003 (2004) (Nater, Arb.), available at <http://www.tas-cas.org>.

¹²⁵ Straubel, *supra* note 57, at 554.

¹²⁶ *Id.* at 556.

1. Short-term performance enhancement: punishable with sanctions of money fine and suspension from competition for up to six months, and
2. Long-term performance enhancement: punishable with money fine up to \$100,000 and a two-year suspension.¹²⁷

If, however, there is a showing of intent or culpability, the penalty for each category can be increased.¹²⁸ Furthermore, a lifetime ban can be imposed if the Court finds that the offender was trafficking the banned substance(s) and method(s).¹²⁹

III. Discussion: Edwards Case

In the summer of 2004, the court in *Edwards v. International Association of Athletics Federation*, a case submitted for arbitration to the Ad Hoc Division of the CAS sitting in Athens, upheld sanctions that had been imposed on a track athlete in a previous arbitration.¹³⁰ *Edwards* involved an appeal of a two-year suspension rendered by an AAA Panel and the disqualification of all results obtained after a positive drug test on April 24, 2004.¹³¹ The athlete, Torri Edwards, sought a reduction or elimination of her sanction in hopes of being allowed to compete in the Athens Olympics.¹³²

The positive doping test that ultimately resulted in sanctions against Ms. Edwards was taken at an International Association of Athletics Federation (IAAF) competition in

¹²⁷ *Id.* at 557.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Edwards v. Int'l Ass'n of Athletics Fed'n*, CAS No. OG 04/003, § 7 (2004) (Nater, Arb.), available at http://www.usantidoping.org/files/active/arbitration_rulings/TFedwardsfinalCAS081704.pdf. See also Reeb, *supra* note 55 (discussing the 1992 case of Elmar Gundel, who lodged an appeal for arbitration with the CAS following sanctions imposed on him by the International Equestrian Federation after his horse tested positive for a doping violation).

¹³¹ *Edwards v. Int'l Ass'n of Athletics Fed'n*, CAS No. OG 04/003, § 1, ¶ 1.1 (2004) (Nater, Arb.), available at http://www.usantidoping.org/files/active/arbitration_rulings/TFedwardsfinalCAS081704.pdf.

¹³² *Id.* at § 1, ¶ 1.13. Specifically, Edwards sought a "reduction or elimination of her sanction." *Id.* at § 1, ¶ 1.8.

Martinique on April 24, 2004.¹³³ In this case, the urine sample taken from Ms. Edwards showed the presence of the banned stimulant nikethamide.¹³⁴ After being notified of the positive test, Ms. Edwards explained, in a letter dated May 25, 2004, that the positive test was due to the ingestion of two glucose tablets, labeled Coramine Glucose, given to her by her physical therapist.¹³⁵

In June 2004, the United States Anti-Doping Agency (USADA) sought a two-year suspension of Ms. Edwards due to the anti-doping rule violation.¹³⁶ At an arbitration hearing before the AAA on July 19, 2004, Ms. Edwards admitted to the doping violation, however, she claimed “exceptional circumstances” and sought a reduction or elimination of her sanction pursuant to IAAF Rule 38.12 et seq.¹³⁷ The AAA rendered an interim award on July 22 2004, stating that such exceptional circumstances could possibly exist and referred the case to the IAAF Doping Review Board for further determination.¹³⁸ However, the Doping Review Board found no “exceptional circumstances” and remitted the matter to the AAA Panel to impose the appropriate sanctions.¹³⁹

¹³³ *Id.* at § 1, ¶ 1.3.

¹³⁴ *Id.* at § 1, ¶ 1.4.

¹³⁵ *Id.* at § 1, ¶ 1.5. An accredited laboratory, Aegis Sciences Corporation, confirmed the presence of nikethamide in the Coramine Glucose tablets at levels consistent with Edwards’ positive test. *Id.* at § 1, ¶ 1.6. According to Ms. Edwards, the glucose was not taken for medicinal purposes; rather, it was taken as a food source. *Id.* at § 5, ¶ 5.8.

¹³⁶ *Id.* at § 1, ¶ 1.7.

¹³⁷ *Id.* at § 1, ¶ 1.8. For a discussion of “exceptional circumstances,” see also Int’l Ass’n of Athletics Fed’ns, Competition Rules, 38.12 (2004-2005), available at <http://www.iaaf.org/newsfiles/23484.pdf> (last visited Oct. 16, 2005).

¹³⁸ *Edwards v. Int’l Ass’n of Athletics Fed’n*, CAS No. OG 04/003, § 1, ¶ 1.9 (2004) (Nater, Arb.), available at http://www.usantidoping.org/files/active/arbitration_rulings/TFedwardsfinalCAS081704.pdf. In the meantime, Ms. Edwards qualified for the US Olympic Team for both the 100 and 200-meter athletics events. *Id.* at §1, ¶ 1.2.

¹³⁹ *Id.* at § 1, ¶ 1.10. The AAA Panel entered a final award, imposing a two-year sanction and disqualification of all results from the date of the positive drug test, on August 10, 2004. *Id.* at §1, ¶ 1.12.

Ms. Edwards' filed an appeal on August 13, 2004, with the actual hearing being held three days later from 5:00 pm until 10:40 pm.¹⁴⁰ In the proceeding, the Ad Hoc Division applied the rules of the IAAF and considered itself bound by the IAAF Constitution, Rules, and Regulations.¹⁴¹ In addition,

where the appeal to CAS in a doping-related case . . . [is] . . . on the question of exceptional circumstances, [review] shall be limited to . . . the materials before the Doping Review Board and to its determination. The CAS Panel will only interfere with the determination of the Doping Review Board if it is satisfied:

- a. that no factual basis existed for the Doping Review Board's determination;
- b. the determination reached was significantly inconsistent with the previous body of cases considered by the Doping Review Board, which inconsistency cannot be justified by the facts of the case; [and]
- c. that the determination reached by the Doping Review Board was a determination that no reasonable review body could reach.¹⁴²

At the hearing, appellant Edwards argued that the sanctions imposed on her were the harshest ever handed down for a first-time, unwitting offender, and that the new IAAF sanctions "run counter to CAS precedents holding that punishment should be a function of the athlete's culpability," especially when her positive test resulted from "an isolated, inadvertent, unknowing, and unintentional ingestion of an innocuous food product at a non-competition track meet."¹⁴³ Ms. Edwards further contended that she should not be subjected to the same punishment as an athlete who intentionally commits a doping violation.¹⁴⁴ She also argued that her actions in avoiding the

¹⁴⁰ *Id.* at § 2, ¶¶ 2.1.1-2.2.2.

¹⁴¹ *Id.* at § 2, ¶ 2.3.7 (citing IAAF Rule 60.28).

¹⁴² *Id.* at § 2, ¶ 2.3.6 (citing IAAF Rule 60.27).

¹⁴³ *Id.* at § 3, ¶¶ 3.1.1, 3.1.2.

¹⁴⁴ *Id.* at § 3, ¶ 3.1.2.

ingestion of prohibited substances were reasonable because glucose is a food source (not a supplement or medication) and that there was no indication that the Coramine Glucose contained substances other than pure glucose.¹⁴⁵ Finally, she contended that IAAF rules are inequitable because not all Olympic athletes are currently subject to the same sanctions for the same types of doping offenses.¹⁴⁶ In response to these inequities, Ms. Edwards argued that the ad hoc division should render a decision that would allow:

1. the retention of all results following the Martinique meeting, including the U.S. Olympic Trials;
2. the elimination of the two-year suspension, or, in the alternative, a time reduction based on time already served, allowing her to be eligible for competition in the Athens Olympics;
3. the issuance of orders by the Panel to allow competition in all Olympic events for which she qualified; or
4. the reduction of sanctions to reach a level comparable to those imposed on other athletes in similar situations.¹⁴⁷

Requesting that the sanctions be upheld, the IAAF contended that the sanctions imposed by the AAA were correct because nikethamide is a prohibited substance and the appropriate sanction for a first-time violation is a two-year suspension.¹⁴⁸ It was further argued that the CAS' precedent of punishing an athlete based on her level of

¹⁴⁵ *Id.* at § 3, ¶ 3.1.5.

¹⁴⁶ *Id.* at § 3, ¶ 3.1.8.

¹⁴⁷ *Id.* at § 3, ¶ 3.2.

¹⁴⁸ *Id.* at § 3, ¶ 3.3.2 (citing IAAF Rule 40.1). See also World Anti-Doping Agency, *The 2004 Prohibited List: International Standard*, § S1 (Sept. 2003), available at, http://www.ittf.com/World_Events/PDF/Olympic/list_standard_2004.pdf (last visited Oct. 16, 2005) (listing nikethamide as a prohibited substance).

culpability was followed because Ms. Edwards was negligent in ingesting the tablets and therefore not without culpability.¹⁴⁹ Furthermore, no inconsistency could exist between Ms. Edwards' sanctions and those previously handed down, as this was the first case to arise since the restructuring of doping policy following the Sydney Games.¹⁵⁰ In addition, the fact that other sports federations do not impose similar sanctions on their athletes is irrelevant because each has its own rules to govern its own athletes.¹⁵¹ Ms. Edwards was found to be an athlete subject to IAAF Rules, and as such, the CAS held that IAAF rules should apply.¹⁵²

In its decision, the CAS began by outlining the applicable IAAF Rules. For example, Rule 32 on Anti-Doping Rule Violations, states that “[d]oping is defined as . . . the presence of a prohibited substance or its metabolites or markers in an athlete's body tissues or fluids.”¹⁵³ Each athlete has the personal duty to ensure that no prohibited substances enter body tissue or fluids regardless of intent, fault, negligence or knowledge unless “exceptional circumstances” exist.¹⁵⁴ Rule 38 requires a

¹⁴⁹ *Edwards*, CAS 04/003 at § 3, ¶ 3.3.3.

¹⁵⁰ *Id.* at § 3, ¶ 3.3.6.

¹⁵¹ *Id.* at § 3, ¶ 3.3.7.

¹⁵² *Id.*

¹⁵³ *Id.* at § 4, ¶ 4.1 (citing IAAF Rule 32.2(a)).

¹⁵⁴ *Id.* It is, however, possible for an athlete to have “[n]o fault or [n]o Negligence.” *Id.* This occurs when the athlete presents “exceptional circumstances,” proving that “the athlete did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered a prohibited substance or prohibited method.” *Id.* The Rules, however, specifically prohibit the following from constituting exceptional circumstances:

[A]n allegation that the prohibited substance or prohibited method was given to an athlete by another person without his knowledge, an allegation that the prohibited substance was taken by mistake, an allegation that the prohibited substance was due to the taking of contaminated food supplements or an allegation that medication was prescribed by athlete support personnel in ignorance of the fact that it contained a prohibited substance.

Id. Any suspension given to the athlete as a result of a doping violation remains in place until a Doping Review Board can make a proper determination on the exceptional circumstances. *Id.* In the *Edwards* case, the AAA Panel found that there may have been exceptional circumstances, appropriately adjourned

provisional suspension, hearing, and sanction or exoneration when a doping violation is asserted.¹⁵⁵ The penalty for a doping violation is outlined in IAAF Rule 40.¹⁵⁶ It requires a two-year period of ineligibility following a first offense and lifetime ineligibility for subsequent infractions.¹⁵⁷ Rule 60 permits an appeal of all decisions to the CAS.¹⁵⁸

Following its outlining of the applicable rules, the CAS turned its attention to Ms. Edwards' claim for exceptional circumstances.¹⁵⁹ Ms. Edwards, in her May 25, 2004 letter of explanation, stated that the presence of the prohibited substance nikethamide in her system was a "shock" and apparently came from glucose tablets provided to her by a chiropractor.¹⁶⁰ However, according to IAAF Rules, exceptional circumstances can only apply when there is no fault or negligence on the part of the athlete,¹⁶¹ which was not the case here.

While the Panel found that Ms. Edwards conducted herself with honesty and integrity, and did not seek to gain an improper advantage from the use of the glucose tablets, her actions, contrary to the argument asserted, were not reasonable for the following reasons:¹⁶²

their hearing of the case, and referred it to the Doping Review Board, who, ultimately found there to be no exceptional circumstances. *Id.* at § 5, ¶¶ 5.4-5.7. The AAA Panel then imposed sanctions accordingly. *Id.* at § 5, ¶ 5.7.

¹⁵⁵ *Id.* at § 4, ¶ 4.1.

¹⁵⁶ *Id.* See also IAAF Rule 40.1(a).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* See also IAAF Rule 60.

¹⁵⁹ *Id.* at § 5.

¹⁶⁰ *Id.* at § 5, ¶ 5.1. According to Ms. Edwards the glucose tablets had been purchased by her physical therapist at a local tourist shop that sold toiletries and travel items. *Id.*

¹⁶¹ *Id.* at § 5, ¶ 5.6. However, IAAF Rule 40.3(e) states that if the athlete can demonstrate there is "no significant fault or no significant negligence" then the period of ineligibility may be reduced to no less than half the minimum period of the ineligibility. *Id.* For example, a two-year suspension can be reduced by one year if there is a finding of no significant fault or no significant negligence. *Id.*

¹⁶² *Id.* at § 5, ¶¶ 5.8, 5.9. Ms. Edwards did not know that glucose was for medicinal purposes, and thought it only was a food supplement. *Id.* at § 5, ¶ 5.8.

1. the product, Coramine Glucose, was not available for sale in the United States,
2. it was purchased in a foreign country, and
3. neither the athlete nor the chiropractor examined the packaging or the informational leaflet, whereupon information as to the composition of the tablets was provided.¹⁶³

Had the informational leaflet been referred to, the following warning would have been discovered: "Athletes: Caution, this product contains an active principle which can result in a positive test in case of an anti-doping control."¹⁶⁴ In addition, the packaging around the individual tablets read "0,125g/ 1,5g" without specifying what precise substances were contained therein.¹⁶⁵ Because the information about additional substances was so readily ascertainable to any one who read the warning or looked at the tablet's individual packaging, the Panel found that Ms. Edwards' actions were negligent.¹⁶⁶

While agreeing with the decisions below and upholding the sanctions based on the facts of the case and applicable governing IAAF Rules, the Panel did, however, note that had Ms. Edwards' offense occurred just two short months before, a much lighter penalty would have been imposed instead of the two-year period of ineligibility she

¹⁶³ *Id.* at § 5, ¶ 5.9.

¹⁶⁴ *Id.* at § 5, ¶ 5.10. This quote is the Panel's translation of the original French warning which read as follows: "Sportifs: attention, cette, specialite contient un principe actif pouvant induire une reaction positive des tests pratiques lors de controles antidopage." *Id.*

¹⁶⁵ *Id.* at § 5, ¶ 5.12.

¹⁶⁶ *Id.* at § 5, ¶ 5.11. Specifically, the Panel stated that "[t]here is an obligation and a duty on an elite athlete to ensure that no prohibited substance enters his/her body, tissues or fluid. On balance, the Panel finds that there was negligence in failing to inquire or ascertain whether the product contained a prohibited substance." *Id.* To ignore the various warnings, was, at the least, "negligence on the part of the chiropractor." *Id.* at § 5, ¶ 5.12. The negligence must, according to the Panel, be attributed to the athlete, otherwise, there would be "an end to any meaningful fight against doping if an athlete was able to shift his/her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete . . . did not know of that substance." *Id.*

received.¹⁶⁷ In rendering their decision, the CAS tribunal appears to have accepted Ms. Edwards' equitable argument; however, it was unable to alter the decision of the AAA panel because it was bound by applicable governing-body (IAAF) rules and regulations.

IV. Conclusion

As evinced from the above discussion, arbitration before the Court of Arbitration for Sport differs substantially from arbitration before other bodies, most notably for the following three reasons:

¹⁶⁷ *Id.* at § 5, ¶ 5.13. Had the offense occurred before the implementation of the new IAAF Rules, which came into effect on March 1, 2004, there would have been only a public warning. *Id.* The procedure followed by the CAS in *Edwards* is in line with a recent case handed down by the CAS involving a doping violation in the world of competitive weightlifting. See Galabin Boevski v. IWF, CAS No. 2004/A/607 (2004), available at <http://www.tas-cas.org/en/histoire/frmhist.htm> (last visited Jan. 25, 2005). There, three athletes appealed sanctions imposed after an out-of-competition drug test found that their three urine samples were genetically identical (i.e. the samples had the same genetic composition and came from the same source). See *id.* The applicable International Weightlifting Federation (IWF) Anti-Doping rules used by the CAS were as follows:

1. Doping is forbidden. No person who is subject to this Policy shall engage in a doping offense or assist, encourage or otherwise be a party to a doping offense.
2. For the purposes of this Policy a Doping Offense is . . . the use of a prohibited doping method.
3. Any individual to whom this policy applies who is found to have committed a Doping Offense shall be liable to sanctions.
4. Subject to other provisions in this section, sanctions will apply for the following periods: . . . a two (2) years suspension for a first offense.

Id. at para. 5.2. In rendering its decision the CAS tribunal considered whether a doping offense had been committed, whether the chain of custody had been broken from the time of sample collection to the completed test results (to prove manipulation of the samples), and the applicable sanctions. *Id.* at para 7.1. Because all the parties stipulated that each athlete's urine sample was identical, it was a "necessary implication . . . that a doping offense had occurred." *Id.* at para. 7.2. The Panel found that there was a high likelihood that the manipulation of the samples had, according to the facts presented, occurred before or during urination because the athletes had both the motive and opportunity to do so, and thus, the Panel applied the strict burden of proof standard outlined in prior CAS cases. *Id.* at paras. 7.9.5-7.9.7. Specifically, the burden was addressed by the Panel as follows:

The Respondent's [IF's] burden was only, but sufficiently, to make the Panel "comfortably satisfied" that the Appellant was the culprit. But even if the Appellant's contention were correct, we consider that the Respondent discharged its burden.

Id. at para. 7.9.5 (quoting Michelle Smith DeBruin v. FINA, TAS 98/211, Digest II, 255, 268 (1998)).

1. arbitrators write and publish reasoned opinions explaining and/or justifying their opinions,¹⁶⁸
2. cases are decided according to applicable governing rules of law and regulations binding on the athlete,¹⁶⁹ and
3. decisions are often made in accordance with CAS case precedent.¹⁷⁰

These differences are especially significant for a doping-related offense given the iconic-like status of the athlete in today's society today and is looked up to as a role model and hero. In addition, in strictly applying rules related to doping, the Court is promulgating a policy whereby ignorance is not a viable excuse to a doping rules violation. This policy is furthered by the large degree of transparency in CAS proceedings, which, in turn, enables wide-scale publication of decisions rendered and sanctions imposed. Publication thus has a dual effect: first, publication provides information to the public and other athletes at-large, and, second, publication serves to deter future doping violations. In this respect, CAS arbitration is analogous to public arbitration in that the public has an opportunity to observe the process and hold the offenders accountable for their actions.¹⁷¹

Because CAS proceedings relating to doping offenses are relatively transparent with published opinions relying on case precedent, there can be serious repercussions for athletes. Following the publication of a decision finding a doping violation, public

¹⁶⁸ See, e.g. *Edwards v. Int'l Ass'n of Athletics Fed'n*, CAS No. OG 04/003 (2004) (Nater, Arb.), available at http://www.usantidoping.org/files/active/arbitration_rulings/TFedwardsfinalCAS081704.pdf.

¹⁶⁹ *Id.* at § 4, ¶ 4.1; see also Int'l Ass'n of Athletics Fed'ns, Competition Rules (2004-2005), available at <http://www.iaaf.org/newsfiles/23484.pdf> (last visited Oct. 16, 2005).

¹⁷⁰ See, e.g. *Galabin Boevski v. IWF*, CAS No. 2004/A/607 (2004), available at <http://www.tas-cas.org/en/histoire/frmhst.htm> (last visited Jan. 25, 2005).

¹⁷¹ Buys, *supra* note 16, at 134. (stating that public arbitration "democratic ideals are enhanced because the public has the opportunity to observe the process and hold the governments accountable for their actions with respect to the arbitration for the result").

backlash can be detrimental, and indeed fatal, to an athlete's career.¹⁷² Recent Congressional hearings provide an example of how publication of doping violations can affect large segments of society by simply affording the public "a glimmer of truth."¹⁷³

However, publication also affords parents, teachers, and coaches an opportunity to address the serious issues of substance abuse and cheating because they become a vivid and important issue in society.¹⁷⁴ Equally as important, the Congressional hearings on steroid use publicized, "players ... [being] scolded not just for taking substances that are unsafe, but for doing something immoral. Those who use performance-enhancing substances were called cheaters, cowards, [and] bad examples for children."¹⁷⁵ It is only through continued transparency and publication that the CAS can achieve the same result in hopes of deterring would-be athletes from emulating potentially dangerous behavior.

¹⁷² This is, of course, assuming that sanctions imposed do not end the athlete's career beforehand.

Public backlash could, for example, affect the athlete's ability to sign lucrative endorsement contracts.

¹⁷³ George Vecsey, *Dog-and-Pony Shows Have Their Purpose*, N.Y. TIMES, Mar. 13, 2005, at 8. It should be noted however, the hearings taking place in March 2005 dealt with drug abuse in professional baseball. *Id.*

¹⁷⁴ Barri Bronston, *Juniors on Juice: Professional Athletes Aren't the Only Ones Bulking Up With Performance-Enhancing Drugs*, NEW ORLEANS TIMES PICAYUNE, Mar. 28, 2005, at 1. Recent Surveys have shown that steroid use among youths in America has more than doubled in the last decade. *Id.* See also Sally Jenkins, *What's Revealed in Steroid Spotlight*, WASHINGTON POST, Mar. 22, 2005.

¹⁷⁵ Kate Zernike, *Everybody's Seeking an Edge*, EDMONTON JOURNAL, Mar. 27, 2005, at E1.

